Ketua Pengarah Jabatan Kerja Raya v Strongkota Development Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-01–458 OF 2011 AND P-01–459 OF 2011
MOHAMAD ARIFF, MAH WENG KWAI AND ABANG ISKANDAR JJCA
27 JANUARY 2016

Civil Procedure — Parties — Government, action against — Respondent sued appellants, government agencies for negligence and assumption of liability — Respondent did not include Government of Malaysia as party — Whether correct party cited in present case

Tort — Negligence — Pleadings — Respondent sued appellants for losses on basis of negligence and assumption of liability by appellants — Whether trial judge correctly adjudged case according to parameters as set out by parties before trial

Majlis Perbandaran Pulau Pinang ('MPPP') had rejected the respondent's application for extension of planning permission on a land owned by the respondent situated in Georgetown, Penang ('the said land') on the ground that the said land was affected by the proposed construction of Penang Outer Ring Road ('PORR') project by the appellants. Consequently, the respondent could not continue with its development plans. The appellants were supposed to acquire the said land for the PORR project. Nevertheless, as events transpired, the appellants did not acquire the said land, as such, the respondent filed claim for losses amounting to RM48m against the appellants. The High Court had allowed the respondent's claim for losses, hence the present appeals. The issues for determination were: (a) whether the trial judge had correctly adjudged this case according to the parameters as set out by the parties before trial; and (b) whether the correct party was cited in the present case, namely the Ketua Pengarah Jabatan Kerja Raya.

Held, allowing the appeals with costs of RM50,000 to each appellants here and below; and setting aside the decisions of the learned trial judge:

(1) It is trite that parties to a suit are bound by what have been pleaded in their respective pleadings. The decision of the court at the end of the suit must be in consonance with what had been pleaded by the parties. On the facts, the respondent did not plead negligence as its cause of action against the appellant, thus, the learned trial judge, in deciding the claim on the basis of breach of duty of care, ie negligence and assumption of

liability, did so on unpleaded issue. Further, these issues did not form part of the agreed issues to be tried between the parties and were not addressed expressly in the evidence and submissions of the respondent (see paras 16, 18–19 & 21).

(2) The manner in which the learned trial judge had decided the present case on his own accord on matters which were not pleaded in the statement of claim of the respondent, namely on negligence and assumption of responsibility, which were distinct causes of action in their own right, against the appellants, had in effect, transgressed the legal maxim of 'audi alteram partem'. The learned trial judge had gone plainly wrong in his appreciation of the facts before him. Thus, it was a valid ground for the appeal court to invoke its appellate power to right a wrong so as to prevent a miscarriage of justice (see paras 31 & 45).

(3) The party who had made the decision to acquire the land of the respondent for the purpose of constructing the PORR project was the Government of Malaysia, and not the appellant, Ketua Pengarah Jabatan Kerja Raya. The effect was fatal to the respondent's action, as the Government of Malaysia was not cited as a co-defendant in the relevant suit (see para 42).

[Bahasa Malaysia summary

Majlis Perbandaran Pulau Pinang ('MPPP') telah menolak permohonan responden bagi penambahan kebenaran perancangan atas tanah yang dimiliki oleh responden yang terletak di Georgetown, Pulau Pinang ('tanah') atas alasan tanah tersebut terjejas oleh pembinaan cadangan projek Penang Outer Ring Road ('PORR') oleh perayu-perayu. Akhirnya, responden tidak dapat meneruskan dengan pelan pembangunannya. Perayu-perayu sepatutnya mengambil alih tanah tersebut bagi projek PORR. Walau bagaimanapun, seperti mana kejadian berlaku, perayu-perayu tidak mengambil alih tanah tersebut, dengan itu, responden memfailkan tuntutan bagi kerugian sejumlah RM48 juta terhadap perayu-perayu. Mahkamah Tinggi telah membenarkan tuntutan bagi kerugian responden, maka rayuan ini. Isu-isu untuk penentuan adalah: (a) sama ada hakim bicara telah secara betul menghakimi kes ini mengikut parameter yang ditetapkan oleh pihak-pihak sebelum perbicaraan; dan (b) sama ada pihak yang betul dirujuk dalam kes ini, iaitu Ketua Pengarah Jabatan Kerja Raya.

Diputuskan, membenarkan rayuan-rayuan dengan kos sebanyak RM50,000 kepada setiap perayu di mahkamah ini dan Mahkamah Tinggi; mengenepikan keputusan hakim bicara yang bijaksana:

(1) Adalah nyata bahawa pihak-pihak kepada tindakan terikat oleh apa yang telah diplidkan dalam pliding mereka masing-masing. Keputusan mahkamah pada akhir tindakan mesti selaras dengan apa yang telah

diplidkan oleh pihak-pihak. Atas fakta, responden tidak memplidkan kecuaian sebagai kausa tindakannya terhadap perayu, oleh itu, hakim bicara yang bijaksana, dalam memutuskan tuntutan atas dasar kemungkiran kewajipan berhati-hati, iaitu kecuaian dan andaian liabiliti, telah memutuskan atas isu yang tidak diplid. Selanjutnya, isu-isu ini tidak membentuk sebahagian daripada isu-isu yang dipersetujui untuk dibicarakan di antara pihak-pihak dan tidak dipertimbangkan secara nyata dalam keterangan dan hujahan responden (lihat perenggan 16, 18–19 & 21).

(2) Cara bagaimana hakim bicara yang bijaksana telah memutuskan kes ini adalah atas kemahuannya sendiri atas perkara yang tidak diplid dalam pernyataan tuntutan responden, iaitu atas kecuaian dan andaian tanggungjawab, yang mana adalah kausa-kausa tindakan berbeza dalam hak mereka sendiri, terhadap perayu-perayu, sebenarnya melanggar maksim undang-undang 'audi alteram partem'. Hakim bicara yang bijaksana telah jelas salah dalam penilaian fakta di hadapannya. Oleh itu, ia adalah alasan sah bagi mahkamah rayuan untuk membangkitkan kuasa rayuannya untuk memperbetulkan kesalahan untuk menghalang ketidakadilan (lihat perenggan 31 & 45).

(3) Pihak yang membuat keputusan untuk mengambil alih tanah responden tersebut bagi tujuan pembinaan projek PORR adalah Kerajaan Malaysia, dan bukan perayu, Ketua Pengarah Jabatan Kerja Raya. Kesan adalah serius kepada tindakan responden, kerana Kerajaan Malaysia tidak dirujuk sebagai defendan bersama dalam tindakan relevan tersebut (lihat perenggan 42).]

Notes

For cases on government, action against, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6514–6515.

For cases on pleadings, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1625–1628.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567, CA (refd)

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619, CA (refd)

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)

Chandra Bansi Singh v State of Bihar & Ors AIR 1984 SC 1767, SC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Governors of the Peabody Donation Fund v Sir Lindsay Parksin & Co Ltd [1985] AC 210, HL (refd)

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, HL (refd)

A *Henderson v Merret Syndicates Ltd* [1995] 2 AC 145, HL (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156; [1982] CLJ Rep 190, FC (refd)
Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ
B 293; [2009] 6 CLJ 430, FC (refd)
Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd [2014] 2 MLJ 322, CA (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71, FC (refd)
C

Legislation referred to

Land Acquisition Act 1960 s 32

D **Appeal from:** Civil Suit No 22–538 of 2001 (MT4) (High Court, Pulau Penang)

Noor Hisham bin Ismail (Senior Federal Counsel, Attorney General's Chambers) in Civil Appeal No P-01–458 of 2011 for the appellant.
E *Ramesh Sanghvi (Bharti Seth and Khairun Nadia Sumali with him) (Kassim Tadin Wai & Co) in Civil Appeal No P-01–459 of 2011 for the appellant.*
Ghazi Ishak (B Jeyasingam with him) (Ghazi & Lim) in Civil Appeal No P-01–458 of 2011 for the respondent.
Ghazi Ishak (B Jeyasingam with him) (Ghazi & Lim) in Civil Appeal No
F *P-01–459 of 2011 for the respondent.*

Abang Iskandar JCA:

FACT OF THE CASE

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[1] Strongkota Development Sdn Bhd ('the plaintiff') is a company registered in Malaysia with its registered office in Penang.

[2] I&P Development Sdn Bhd ('I&P') had on 6 September 1991 obtained
H permission from Majlis Perbandaran Pulau Pinang ('MPPP') to construct 148 units of 4–10 storey medium cost apartments on their land in Section 5, Town of Georgetown Penang ('the said land'). However I&P's planning permission had expired on 5 September 1994.

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[3] Notwithstanding that, I&P entered into a sale and purchase agreement ('SPA') with the plaintiff on 6 July 1995 to sell the land to the plaintiff then with the expired planning permission.

[4] I&P applied for renewal of the planning permission. MPPP granted I&P the renewal of the planning permission until 5 September 1995. The plaintiff proceeded with their plan to develop an area of 5.0786 acres of the said land and the remaining area was to be used for future development, road reserve and open space in accordance with the approved plans by MPPP.

[5] When the planning permission expired on 5 September 1995, the plaintiff on behalf of I&P applied for the extension of the planning permission on 6 September 1995, 25 August 1996 and 8 September 1997 by paying the necessary fees which was accepted by MPPP. However, later, MPPP rejected the extension of the planning permission by their letter dated 18 October 1997 to I&P on the basis that the property was affected by the proposed construction of Penang Outer Ring Road ('PORR') project. The revision of the alignment was no longer possible as the PORR project was going to impact on the said land.

[6] Lembaga Lebuhraya Malaysia ('the first defendant') and Ketua Pengarah Jabatan Kerja Raya ('the second defendants') are involved in the implementation and execution of the PORR project.

[7] As a consequence of the decision made by the first and second defendants to construct the PORR project on the entire portion of plaintiff's land comprising 8.5 acres, the plaintiff could not proceed with its development plans as MPPP had refused to renew the planning permission upon the directions by the defendants who were the bodies on whose behalf the said land was supposed to be acquired.

[8] However, the defendants did not acquire the plaintiff's 8.5 acres for the PORR project and this led to the plaintiff filing the claim for losses of RM48m.

[9] The High Court held that the first and second defendants were jointly liable to pay the plaintiff the sum of RM7,693,131.60, with the interests at the rate of 8%pa on the sum of RM7,693,131.60 from the date of judgment until full settlement, and costs of RM50,000.

[10] Aggrieved by the decision of the High Court, both defendants had since appealed against part of the decision namely:

(a) the first and second defendants are jointly liable to pay the damages amounting to RM7,693,131.60;

(b) interests at the rate of 8%pa on the said sum from the date of judgment to the date of full settlement; and

(c) costs of RM50,000 to the plaintiff.

[11] The appeals was heard before us on 14 July 2014. After perusing the record of appeals and submission before us, we had unanimously agreed to allow these appeals with cost of RM50,000 to each defendant/appellant here and below. The decision of learned High Court judge dated 29 June 2011 was therefore set aside. These are now the grounds of our decision.

THE APPEALS

[12] The issues arose before us as enumerated in the submission of the first defendant's solicitor as set out in the memorandum of appeal are:

(a) whether the decision of the court below and the judgment amount ordered to be paid is premised on the plaintiff's pleaded case and relief prayed;

(b) whether this is a case where the Court of Appeal ought to interfere on the finding made by the trial judge on the principle that the trial judge has gone wrong on principles of law or has misapprehended the facts or has failed to judicially evaluate the facts;

(c) whose decision was it to acquire the plaintiff's land and whether the first defendant is the party responsible to acquire the plaintiff's land and if so, whether the acquisition ought to have been done on 19 May 1997 ie when MPPP rejected the fourth and fifth applications for renewal of the planning permission;

(d) whether the first defendant owes any duty of care to the plaintiff to ensure that the plaintiff's land is either acquired or the plaintiff be given liberty to develop the land;

(e) whether the first defendant had voluntarily assumed responsibility and liability under the doctrine based on the cases relied on by the trial judge;

(f) whether the first defendant had not acted within its statutory powers in failing to have taken steps for early acquisition of the plaintiff's land;

(g) whether the first defendant had the absolute power to determine how much of the plaintiff's land was to be acquired;

(h) whether the first defendant had the power to decide how much compensation was to be paid to the plaintiff for the acquisition of the plaintiff's land;

(i) whether the delay in the acquisition of the plaintiff's land was undue, inordinate and unexplained and mala fide;

(j) whether MPPP's rejection of the fourth and fifth applications for renewal of planning permission was on the directions and instructions of the first defendant;

(k) whether by virtue that since one of the six members of the first defendant includes the director general public works department therefore the first defendant was deemed to be aware that MPPP had rejected the fourth and fifth planning permission;

(l) whether the learned trial judge was right in law and in fact to have drawn the various inferences against the first defendant; and

(m) whether the plaintiff has adduced sufficient evidence on the damages sustained by the plaintiff to justify the sum of RM7,693,131.60 awarded to the plaintiff.

[13] It has to be noted that, earlier, this court on 20 November 2014 (before YA Dato' Hishamudin bin Mohd Yunus, YA Datuk Lim Yee Lan and YA Dato' Mohd Zawawi bin Salleh JJCA) had given parties direction to further submit on these three issues namely:

(a) what is the plaintiff's cause of action;

(b) assuming the cause of action is in tort or negligence, has this been properly pleaded in the plaintiff's statement of claim; and

(c) in an action against the government, can the Pengarah JKR be cited as a party without citing also the government of Malaysia as a co-defendant.

[14] It has to be noted too, that since these appeal were ordered to be consolidated and heard together, the second defendant had indicated that it had intended to adopt the submissions by the first defendant, which would be dealt together with the further issues above-mentioned. For the purpose of this grounds of judgment, both defendants hereinafter will be identified as the appellants and the plaintiff as the respondent.

FINDINGS OF THIS COURT

[15] Having heard the able submissions by all learned counsel for the respective parties in this appeal, we had allowed both the appeals with costs.

[16] From the submissions of learned counsel for the appellants, it was clear that the main thrust of this appeal had centered upon whether the trial judge had correctly adjudged this case according to the parameters as set out by the parties well before trial. This set parameters could be seen from what was pleaded in the pleadings of parties. The statement of claim would set out the cause or causes of action of the plaintiff against the defendant. The statement of defence would, of necessity, set out basically what the answer to that claim would be. By the close of pleadings, parties would know exactly what is being claimed by the plaintiff and what the answer to that claim would be. Pleadings therefore prevents surprises during trial as both parties are sure and certain as to

what they are supposed to do in terms of establishing their respective positions in court. There is no element of trial by ambush where a party would be taken by surprise by the other party introducing evidence outside the contemplation of what had been the pleaded cause or causes of action or of defence. It is trite law that parties to a suit are bound by what have been pleaded in their respective pleadings. To further refine the dispute, parties would normally agree with each other as to what are the issues to be tried. Although the pleadings would expressly bind parties, it has the effect of also limiting the power of the adjudicating court, in that the decision of the court, at the end of the trial of the suit, must be in consonance with what had been pleaded by the parties. The reliefs granted by the court must therefore be tailor-made, so to speak, to fit into what had been agreed by the plaintiff as per his statement of claim, in particular based on his cause of action. In other words, if the cause of action had been premised upon the negligent act of the defendant, then once proven by evidence to be so, the court must then proceed to grant the damages to compensate for the losses suffered by the plaintiff as a result of the negligent conduct of the defendant. It would be amiss if the court were to give relief to the plaintiff against the defendant, for a cause of action which was not pleaded, even remotely, in the plaintiff's statement of claim. As such, pleadings have the effect of not only binding the parties, inter se, but it also operates to ensure that the court only grants the reliefs that have been prayed for as pleaded as forming the plaintiff's causes or causes of action. There may be exceptions to this rule of the thumb, but only rarely will the courts depart from this crucial rule of civil litigation.

[17] In this regard, we would refer to the case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 ('*RHB Bank* case') where it was stated by the Federal Court, as follows:

> The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleadings, expressly or by implication can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the parties must abide by their pleadings ... . On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather applying them to a given set of facts.

[18] Bearing in mind the salient principle on pleadings as reiterated by the apex court's justices in the *RHB Bank* case, we had perused through the record of appeal thoroughly. Having done that, we agreed that the respondent did not plead negligence as its cause of action against the appellant. We also noted the

omission on the part of the respondent to particularise in the pleadings, the alleged particulars of negligence committed by the appellant.

[19] We therefore agreed with the learned senior federal counsel ('SFC') that the learned trial judge, in deciding the claim on the basis of breach of duty of care, ie negligence and assumption of liability, did so on unpleaded issues.

[20] In a case where negligence is being alleged against the adverse party, the alleger must plead the salient and particular facts in his pleadings alluding to the alleged negligence. In the Court of Appeal case of *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 learned Justice Mahadev Shanker JCA had occasion at p 668 of the report to say the following:

> It is trite law that a party is bound by its pleadings, and that the allegations of negligence must be pleaded with particularity.

[21] The upside of that rule is that a party cannot pursue matters or issues that it has not pleaded in his pleadings. Further, in this appeal before us, these issues did not form part of the agreed issues to be tried between the parties and were not addressed expressly in the evidence and submissions of the plaintiff.

[22] As regards the assumption of responsibility, again we had looked at the statement of claim of the respondent, to see whether it was pleaded. During submissions before us, learned counsel for the respondent had referred us to paras 17, 18, and 19 to show that assumption of responsibility was pleaded as such. We had looked at those paragraphs and it was our considered view that those paragraphs had not revealed such a cause of action. Neither did we find the facts as pleaded had constituted the cause of action premised on the tort of assumption of liability for the alleged pure economic losses that were caused by the respondent. There was no particularisation by the respondent about the special relationship that must be established before the assumption of liability may be proven to have existed.

[23] For ease of reference, we would now reproduce the three paragraphs in the statement of claim that were referred to above:

> 17. Plaintif menyatakan bahawa akibat keputusan Defendan-Defendan untuk membina projek PORR di atas keseluruhan hartanah tersebut seluas 8.5 ekar, Plaintif tidak dapat meneruskan dengan pembangunan yang dicadangkan di atas hartanah tersebut kerana kebenaran merancang yang diberikan terlebih dahulu tidak dapat dilayan dan hartanah tersebut juga tidak diambil ('acquired') oleh Defendan-Defendan untuk projek PORR tersebut. Pembangunan juga tidak dapat dijalankan di atas tanah-tanah Plaintif seluas 8.5 ekar yang dikenali sebagai Lot 4723 (HS (D) 2834), Lot 4724 (HS (D) 2835), Lot 4725 (HS (D) 2836), Lot 4726 (HS (D) 2837), Lot 4727 (HS (D) 2838), Lot 4728 (HS (D) 2839) Lot 4729 (HS (D)

2840), Lot 4730 (HS (D) 2841), Lot 4731 (HS (D) 2842), Lot 4732 (HS (D) 2843), Lot P T 21 HS (D) 2866, P T 22 HS (D) 2867, P T 23 HS (D) 2868 dan P T 24 HS (D) 2869, Seksyen 5, Bandar Georgetown, Pulau Pinang atas alasan yang sama. Oleh yang demikian, Plaintif telah mengalami kerosakan sebanyak RM55,239,372.40, butir-butir yang mana ada dilampirkan di sini dan ditanda sebagai Lampiran 'A'.

18. Defendan-Defendan telah bertindakan secara menyalahi undang-undang apabila gagal mengambil sebarang langkah dalam kadar yang segera dan/atau tempoh masa yang berpatutan ('reasonable') berhubung pengambilan tanah Plaintif yang terlibat di dalam projek PORR dan ini telah mengakibatkan kerugian kepada Plaintif yang dihalang daripada menggunakan tanahnya dan tidak juga mendapat pampasan daripada Defendan-Defendan.

19. Tindakan Defendan-Defendan seperti yang dinyatakan di atas yang masih berterusan sehingga ke hari ini adalah salah dan tidak sah kerana ia menghalang hak Plaintif di dalam menggunakan dan menikmati tanahnya dan tindakan-tindakan Defendan-Defendan adalah bercanggah dengan hak-hak yang diberikan oleh undang-undang kepada Plaintif iaitu Plaintif tidak boleh dinafikan penggunaan dan penikmatan tanahnya tanpa pampasan yang memadai.

Plaintif dengan itu menuntut:

(a) Ganti rugi sejumlah RM55,239,372.40 daripada Defendan-Defendan untuk dibayar pada kadar seperti yang ditetapkan oleh Mahkamah yang mulia ini;

(b) Ganti rugi teladan;

(c) Faedah ke atas gantirugi yang diawadkan pada kadar 8% setahun dari tarikh 19.5.1997 sehingga tarikh penyelesaian sepenuhnya;

(d) Kos; dan

(e) Lain-lain relif yang difikirkan patut oleh Mahkamah yang mulia ini.

[24] With respect, we agreed with the learned SFC on this matter, as well as with the submissions of learned counsel for the appellant, the LLM. As such, this cause of action was not pleaded with the required sufficiency.

[25] Be that as it may, assuming that we were wrong in our appreciation of the pleadings pertaining to the assumption of responsibility in that it was in fact sufficiently pleaded, we were in agreement with learned counsel for both the appellants in these two appeals that the learned trial judge was in error when he had concluded as he did that there was assumption of responsibility or liability in this case as a basis for attaching liability against the appellants.

[26] Assumption of responsibility is a tort of quite a recent acceptance. It is a tort under common law of England pertaining to pure economic loss. It has as its genesis in the decision of the English House of Lords in the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, a case that was concerned with a claim arising from financial losses suffered by a plaintiff resulting from a negligent misstatement. Prior to that decision, the notion that a party may owe another a duty of care for statements made in reliance had been rejected, with the only remedy for such losses being in contract law. The English apex court had overruled the previous position, in recognising liability for pure economic loss not arising from a contractual relationship, introducing the idea of 'assumption of responsibility'. Central to the tort of assumption of responsibility are elements of a relationship between the parties, and of foreseeability of damage, before a duty of care may be inferred against the party alleged against. Then there is that overarching element to be considered, namely whether it would be just and reasonable for such a legal relationship to be established, as against the alleged party.

[27] In the case of the *Governors of the Peabody Donation Fund v Sir Lindsay Parksin & Co Ltd* [1985] AC 210 ('*Governors of Peabody Donation Fund* case') Lord Keith of Kinkel had said the following:

> So in determining whether or not a duty of car of a particular scope was incumbent upon a defendant it is material to take into account whether it is just and reasonable that it should be so.

[28] Having perused through the records of appeal, in particular, the grounds of judgment of the learned trial judge, we could not find anywhere therein did he appreciate the evidence before him in the context of what was required of the court by the *Governors of Peabody Donation Fund* case. In other words, he did not address his mind as such.

[29] The case of *Henderson v Merret Syndicates Ltd* [1995] 2 AC 145 deserved mention because it was the case where the court had held that when there is an assumption of responsibility and reliance on professional services there is a tortious duty of care irrespective of a simultaneous contractual relationship.

[30] At this juncture also, it would be appropriate to refer to the case of *Caparo Industries plc v Dickman* [1990] 2 AC 605 at p 617 where it was held:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the

A situation should be one in which the court considers it fair, just and reasonable and that the law should impose a duty of a given scope upon the one party for the benefit of the other.

B **[31]** Based on the above, we were therefore of the view that the manner in which the learned trial judge had decided this case on his own accord on matters which were not pleaded in the statement of claim of the respondent, namely on negligence and assumption of responsibility, which are distinct causes of action in their own right, against the appellants, had in effect, transgressed the legal maxim of 'audi alteram partem'. In this regard, we would C refer to the decision of this court in the case of *Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 ('*Pembinaan SPK Sdn Bhd* case') where it was said:

D [21] The case before the High Court involved an odd situation. The High Court had in fact dismissed the claim for special and general damages after a full trial because these claims were not proven. Quantum merit was described as being the lesser of these claims. Logically, if the greater was dismissed, the lesser must by right also fall. Of course, if material facts on a quantum meruit claim had been introduced, established, evaluated and accepted by the court, there could possibly be some room for argument, but this was not the case in this appeal. The learned E judicial commissioner decided on his own accord to order damages to be assessed on the basis of quantum meruit for the sake of justice and fairness. Regrettably, in proceeding to act on his own accord, the learned judicial commissioner had perhaps downplayed another important component of practical justice in hearing cases before the court, and that concerned the maxim 'audi alteram partem'.

F [22] To decide on an unpleaded claim is to deny the opposing party the valuable right to answer the claim by adducing such material facts at the trial as it might find necessary to forward to the court to advance its case against the claim. On the facts of this appeal, however, the problem was compounded by the absence of supporting material facts in relation to a quantum meruit claim. This claim was never expressly G pleaded and was never part of the agreed facts or agreed issues. It never figured even in the summary of the plaintiff's case, the plaintiff's case was wholly grounded on a claim for special and general damages for breach of the cooperation agreement. To quote the plaintiff in its 'Ringkasan Kes Plaintiff':

H 2 Secara umumnya, tuntutan Plaintif terhadap Defendan adalah meliputi gantirugi khas berjumlah RM6,971,246.50, gantirugi am, gantirugi sampingan (consequential), gantirugi kerosakan reputasi, faedah dan kos akibat daripada kemungkiran kontrak/perjanjian oleh Defendan ...

I 7 Plaintif akan menunjukkan kepada Mahkamah butir-butir kerugian, kehilangan dan jumlah yang terlibat sama ada dalam bentuk khas, am, sampingan dan kerosakan reputasi, yang telah dialami oleh Plaintif sewaktu perbicaraan nanti ...

[23] In such a situation, a return to the basic governing principles and rules of pleadings in our system of civil litigation will be timely and appropriate. This was also the route adopted by the learned judicial commissioner, but, with the utmost

respect, his conclusions resulted from a misapplication of these basic principles. The law reports are replete with exhortations and reminders by judges on the need for decisions to be grounded on the pleaded case of the litigants, whether plaintiff or defendant. The need to comply with the rules on pleading are generally to be strictly enforced to avoid surprises at the trial and to narrow and define the issues of the parties so that each will know the opposing party's case, to prepare to meet it in advance and to marshal the necessary evidence at trial to establish its claim and answer the defence of the opposing party. The underlying rationale is not only to prevent surprises as seemed to be the reasoning of the High Court, but is much more than just that.

[24] That classic, authoritative text on the rules of pleadings — Sir Jack Jacob & Ian S Goldrein, Pleadings: Principles and Practice — provides four 'objects' of pleadings, and it will be worthwhile to quote the relevant passage:

Pleadings — their dual object in summary. Pleadings serve a two-fold purpose:

> (a) first to inform each party what is the case of the opposite party which he will have to meet before and at the trial; and
>
> (b) secondly concurrently to appraise the court what are the issues. The identity of the issues is crucial, not only for the purposes of trial, but also for the purposes of all the pre-trial interlocutory proceedings.

The object of pleadings — in detail:

> (a) first, to define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court ...
>
> (b) secondly, to require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial ...
>
> (c) thirdly, to inform the court what are the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action which may not be extended without due amendment properly made ... in *Blay v Pollard* and Morn's Scrutton LJ said:
>
> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course ...
>
> (d) Fourthly to provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided thereon so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them ... (at pp 3–4 of the text (1990 Ed).

A [25] As evident from the passage above, not only are the immediate litigants bound by the rules of pleadings, so is the court.

The court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the court to enter into any inquiry into the case before it other than to adjudicate upon the specific matters in
B dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation ... (*Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218).

C [26] A decision based on an unpleaded case will as a rule occasion a failure of natural justice and will be liable to be set aside on appeal. It denies the litigant the right to present his case fully before the judge on the unpleaded issue before the decision is made by the court. A corollary to this principle is the following: it is not the duty of the court to make a case for a party when that party does not raise, or wish to raise,
D a point in the litigation. *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, states the position very clearly thus:

A judgment should be based upon the issues which arise in this suit. If such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be
E said to be in accordance with the law and the rules of procedure.

[32] The factual matrix that obtained before this case may not be entirely identical with the one that was before this bench in the *Pembinaan SPK Sdn*
F *Bhd* case but the principle in the latter case was surely applicable to the scenario in this case where the learned trial judge had on his own accord decided the fate of the claim based on causes of actions which were not pleaded by the respondent. At the risk of being repetitious, we would reiterate that paras 17, 18 and 19 did not disclose with clarity the causes of action of negligence and
G assumption of responsibility.

[33] As to the legal consequences in a circumstance where the court has acted in a manner that was inconsistent with the pleaded case as agreed between the litigating parties, we would cite two decided cases to illustrate the crucial point.
H First, we would cite the case of *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293; [2009] 6 CLJ 430 where the Federal Court had said:

[19] It is trite that in the pleading, frustration, particulars which would give rise to frustration must be provided specifically in the pleadings. The parties in this case
I had not pleaded or submitted that the contract in question had been frustrated. Thus, the defendants were highly prejudiced when the Court of Appeal decided on the issue of frustration.

[34] Secondly, we would cite the case of *Aseambankers Malaysia Bhd & Ors v*

Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619 where learned Justice Abdul Malik Ishak JCA had this to say:

> ... the High Court judge held that the first appellant was liable for 'breach of duty of good faith' and for breach of fiduciary duties. With due respect, the findings of the High Court judge were all based on causes of action that were not pleaded. On this ground alone, the appeal should be allowed.

[35] In the case of *Pembinaan SPK Sdn Bhd* the respondents there had relied on the omnibus prayer that had read as follows: 'Lain-lain perintah yang difikirkan wajar, sesuai dan manfaat oleh Mahkamah yang mulia ini'. The case of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156; [1982] CLJ Rep 190 was cited in support thereof. We agreed with the approach taken by this court in the *Pembinaan SPK Sdn Bhd* case when it had said as follows:

> In our opinion, the decision of the Federal Court in *Lim Eng Kay v Jaafar bin Mohamed Said* , cannot be so liberally read as to countenance a major breach or misapplication of fundamental rules of pleadings and the proper role of the court in our adversarial system of civil justice.

[36] We were of the view that the omnibus clause ought to be utilised in cases which would warrant such application, but it ought not to be applied in *all* situations, as a fall-back provision to provide a convenient cover for an obvious defective pleadings pertaining to failure to specifically or sufficiently pleaded cause or causes of action by a litigant. We therefore found no reason to depart from the approach undertaken by this court in the *Pembinaan SPK Sdn Bhd* case.

[37] From a perusal of the record of appeal, we noted that the learned trial judge had not exhibited in his grounds of judgment as to how the elements required for such an assumption of responsibility to exist had been fulfilled. At this juncture, we would advert to the *Caparo Industries* case which stated that in addition to the need to prove reasonable foreseeability, a relationship of proximity would also have to be established and there must be due consideration in that the imposition of a duty of care must be fair, just and reasonable. The House of Lords had occasion to say the following:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that *the situation should be one in which the court considers it fair, just and reasonable* and that the law should impose a duty of a given scope upon the one party for the benefit of the other. (Emphasis added.)

[38] In yet another case, it was held that:

A The critical question, as was pointed out the analysis of Brennan J in his judgement in *Sutherland Shire Council v Heyman* [1985] 60 ALR 1, is not the nature of damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the Plaintiff claims to have been sustained. (See the case of *Murphy v Brentwood DC* [1990] 2 All ER 908.)

B

[39] Having said that, we were well aware that whether such a duty existed was a question of fact which the trial court would have to make the necessary finding based on the evidence as adduced before it. The case of *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 had made that clear.

C

[40] Premised on the above, it was our view that the appeals by both the appellants before us must be allowed on the pleadings point and the fact that the learned trial judge had decided against the appellants on causes of action that were not pleaded by the respondent. It also did not escape our notice that the respondent had amended the pleadings not less than four times and it was apparent that there was no intention on its part to amend the relevant paragraphs so as to reflect the causes of action of negligence and assumption of responsibility. We had therefore so decided.

D

E

[41] But for completeness, we were of the view that the consent judgment dated 6 August 2007 ought to be taken into account as a judgment in full and final settlement of the plaintiff's claim for compensation without any reservation on the pending suit the subject matter of these appeals.

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[42] On the issue of whether the correct party was cited in this suit, namely the Ketua Pengarah Jabatan Kerja Raya (the appellant in the Case No P-01–458 of 2011) on the perusal of the evidence, we agreed with the learned SFC that the party who had made the decision to acquire the land of the respondent for the purpose of constructing the PORR project, was the Government of Malaysia, and not the appellant Ketua Pengarah Jabatan Kerja Raya. We also agreed that the effect was fatal to the respondent's action, as the Government of Malaysia was not cited as a co-defendant in the relevant suit.

G

H

[43] We found further that there was no basis in law for the learned trial judge to have awarded interest at 2%, s 32 of the Land Acquisition Act 1960 was an entirely irrelevant section for this purpose. Again, the loss of interest was never pleaded in the statement of claim of the respondent. The case of *Chandra Bansi Singh v State of Bihar & Ors* AIR 1984 SC 1767 cited by the learned trial judge was, with respect, decided the way it was, on the peculiar facts before the court there and could not therefore be similarly applied in this case.

I

[44] We were well aware of the role of an appellate court when dealing with findings of facts by the trial judge in that the appellate court should be slow to disturb such findings. The learned counsel for the respondent in both appeals before us had cited the case of *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 as an authority for that proposition. We had no difficulty in embracing the principle laid down in that case. But having said that, each case would have to be judged according to its peculiar sets of facts. In these appeals, the learned trial judge had wrongly appreciated the evidence and the facts before him.

[45] As such, the learned trial judge had gone plainly wrong in his appreciation of the facts before him. That was a valid ground for this court to invoke its appellate power to right a wrong so as to prevent a miscarriage of justice to be occasioned. The case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 was instructive in that regard.

[46] In the upshot, we had allowed the two appeals with costs. We had set aside the decisions of the learned trial judge which had been given in favour of the respondents. As regards costs, we had awarded costs of RM50,000 to each of the appellants, here and below. Deposits, if any, were ordered to be refunded to the respective appellants.

[47] Order accordingly.

Appeals allowed with costs of RM50,000 to each appellants here and below; decisions of learned trial judge set aside.

Reported by Dzulqarnain Ab Fatar